UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMI/DIVISION OF DCX-CHOL ENTERPRISES, INC.	
and	Cases 25-CA-117090
	25-CA-117093
INDIANA JOINT BOARD, RETAIL,	25-CA-117097
WHOLESALE, DEPARTMENT STORE	25-CA-117151
UNION, UNITED FOOD & COMMERCIAL	25-CA-117254
WORKERS UNION, LOCAL 835 a/w	25-CA-120437
INDIANA JOINT BOARD, RETAIL,	25-CA-125968
WHOLESALE, DEPARTMENT STORE	
UNION, UNITED FOOD & COMMERCIAL	
WORKERS UNION	

BRIEF IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Comes now Counsel for the General Counsel and respectfully submits the following brief in support of the General Counsel's exceptions to the decision of the Administrative Law Judge in this matter which was issued on September 23, 2014. The General Counsel asserts that the Administrative Law Judge erred in failing to rule on General Counsel's allegation that Respondent violated the Act by withdrawing recognition from the Union because the claimed loss of majority support was tainted by the presence of significant, unremedied unfair labor practices.

I. STATEMENT OF FACTS

Respondent is engaged in the manufacture of wire, cables, and harnesses. (TR 18, 243) It has an office and principal place of business in Fort Wayne, Indiana. (TR 54) The Fort Wayne facility is one of six divisions of DCX-Chol, Enterprises, Inc. (DCX), which is based out of California, and whose other divisions are located in Illinois and California. (TR 44) The Fort Wayne facility used to be owned by Stuart Manufacturing (SM). (TR 18) Respondent bought the assets of SM in August 2013. (TR 18, 44) As part of the asset buyout, Respondent acquired the facilities, equipment, supplies, contracts, customers, and employees of SM. (TR 20, 45) Respondent admits that it is a successor to SM. (TR 47) SM was owned by Lionel Tobin. (TR 17) Respondent's President and co-owner is Neal Castleman, who is based out of California. (TR 44) Respondent's Fort Wayne operations are overseen by Gerald Pettit, who was General Manager at SM and was hired by Respondent as Vice-President and General Manager. (TR 20, 83) Carol Goods-North, who was the Director of Human Resources at SM, was hired by Respondent as Vice-President of Human Resources. (TR 43-44) Goods-North is Lionel Tobin's sister. (TR 44) She is also based out of California. (TR 47)

The production and maintenance employees employed by SM were represented by the Union for many years. (TR 28, 105) At the time of the buyout, there was a collective-bargaining agreement effective by its terms from February 9, 2011 to February 8, 2014 and there were between 40 and 54 employees in the bargaining unit. (TR 240, 253, Jt. Ex. 1) After the buyout, Respondent applied the existing terms of the collective-bargaining agreement to bargaining unit employees. (TR 48) Respondent's only unionized division is the Fort Wayne facility. (TR 54)

By letter dated August 19, 2013, Respondent informed the Union of the change in ownership and acknowledged that it was a successor of SM. (TR 51, 106, Jt. Ex. 2). The letter

was signed by Carol Goods-North and Gerald Pettit. (TR 51, Jt. Ex. 2) The letter was handed to the Union's President, David Altman, in person, at a meeting held at Respondent's facility. (TR 51, 106-107) In attendance at the meeting were Goods-North, Pettit, Altman, and the Union's Unit Chairman Jamarcus Tinker. (TR 51, 106-107, 222) The letter states that the two owners were still ironing out the particulars of which customers would be serviced by SM or Respondent and that SM was still owned by Tobin. (TR 107, Jt. Ex. 2) It also states that Respondent understands that by purchasing SM's assets they became "a successor" and that they expected to request various modifications to the collective-bargaining agreement within the next week. (Jt. Ex. 2) At the meeting, Goods-North said that she knew that one of the changes Respondent would need was to change the employees' pay date from every other Wednesday to the 5th and 20th of the month. (TR 52, 107, 222, G.C. Ex. 2) Altman stated that he did not have a problem with that change but that the employees would have to vote to approve the change. (TR 53, 108, 223) Goods-North stated that if the new owner did not get the changes needed he could close the plant and move away. (TR 108, 223, G.C. Ex. 2)

Shortly before or around August 19, 2013, Respondent held a company-wide meeting where Neal Castleman introduced himself and announced to employees the buyout. (TR 222) Employees were told that any changes to the business would take time. (TR 222) According to Goods-North and Pettit, they were aware that employees had many questions and that there was a lot of speculation going around about what would happen under the new ownership. (TR 58, 86) On August 22, 2013, David Altman went to the facility to attend a regularly scheduled monthly grievance meeting. (TR 109, 224) For at least seven years, since Goods-North was hired by SM, Altman had been allowed to meet with employees after the monthly grievance meeting ended. (TR 56-57, 99, 111, 236) As had been the past practice, at the end of the meeting Altman

asked to be allowed to go to the employee break room to meet with employees. (TR 110-111, 225) Pettit told him that they were too busy and denied him access. (TR 86, 110, 225, G.C. Ex. 2). Altman argued that he was always allowed to meet with employees after grievance meetings and that it was a contractual right. (TR 111, 224) Pettit said that it would be disruptive and Altman questioned how it could be disruptive if employees were on break. (TR 111, 224-225) Pettit did not relent and denied him access. (TR 111, 225) Pettit testified that the reason he did not want Altman talking to employees was that he did not want employees concerned about their jobs since he knew employees had a lot of questions and Respondent did not have answers for them at that time. (TR 86-87)

On August 26, 2013, Altman sent a facsimile to Goods-North in which he stated that the Union was having a meeting and requested that she send him any contract modifications Respondent needed so that he could discuss them with his members. (TR 113, G.C. Ex. 3) In an email dated August 29, 2013, Goods-North replied to Altman stating that Respondent is still finalizing the transition with SM and that they are still working through many challenges, however she proposed that Respondent would accept the existing contract unchanged except for the change to the pay dates. (TR 119, G.C. Ex. 4). On September 3, 2013, by email, Altman proposed that the Union be allowed to hold a secret ballot election at the employee break room to vote on the change to the pay date. (TR 119, G.C. Ex. 4) Goods-North replied by email that Respondent had been notified that a petition for decertification had been filed with the Region and that she would prefer to wait on the Board's decision before moving forward. (TR 120, G.C. Ex. 4) Indeed a petition for decertification was filed with the Region on August 18, 2013. (TR 251)

At the monthly grievance meeting held on October 16, 2013, Altman asked Goods-North what was going on with the buy-out transaction. (TR 120, G.C. Ex. 2) Goods-North replied that it was taking longer than she ever thought it would. (G.C. Ex. 2) Altman asked if there would still be two companies and she said that yes, Respondent would use the 1615 Wallace Street address and SM would use the 1613 Wallace Street address. (TR 121, 227, G.C. Ex. 2) These addresses are at the same facility but different only for purposes of the U.S. Postal Service. (TR 23) Altman told Goods-North that he had heard than Tobin was going around the facility soliciting employees to go work for him. (TR 122, 226-227, G.C. Ex. 2) Goods-North said that Tobin needed employees who lived in the "HUB zone" to be able to perform work for ITT Aerospace, a former SM customer. (TR 25-26, 60, 122, 227, G.C. Ex. 2) She said that he would need about 25 employees. (TR 122, G.C. Ex. 2) The HUB zone is a government program for small businesses that operate and employ people in historically underutilized business zones. (TR 19) For a business to be designated as HUB zone certified its principal office has to be in the HUB zone and at least 35% of its workforce must reside in the HUB zone. (TR 20) Altman asked if both companies would operate under the same collective-bargaining agreement and Goods-North said that Respondent would be under the Union contract but not Tobin's company. (TR 122, 227, G.C. Ex. 2) Altman stated that if employees who went to work for Tobin wanted to be represented they would have to have an election. (TR 123-124, G.C. Ex. 2) Goods-North said that she wanted to ask that to the Region and Altman told her that the Region was closed due to the government shut-down. (TR 123-124, G.C. Ex. 2) She said that Pettit had told Tobin he could not have some of the employees that Tobin had talked to who lived in the HUB zone because they were skilled in more than just the ITT cables. (TR 125, G.C. Ex. 2)

In the meantime, Tobin had kept his office at the facility post-sale and had kept the same telephone number. (TR 23) Employees Jamarcus Tinker, Angela Cox and Joe Horton testified that they frequently saw Tobin walking around the facility talking to employees for several months after Respondent took over the facility. (TR 175, 202, 225) Tobin was planning, as Goods-North had stated, to restart an operation under the SM name that would continue to serve customers who were required to do business with HUB zone companies. (TR 20, 22, 25, 85) Tobin explained that Respondent could not continue to perform HUB zone work because it was not a small disadvantaged business and that he knew that Respondent consequently would lose some contracts that he hoped his company would pick up. (TR 19, 24) He planned on leasing office space, equipment and production space from Respondent. (TR 20, 22, 25, 32) With Pettit's permission, Tobin met with about 15 employees in the facility's conference room to interview them in the October 2013 timeframe. (TR 26-27, 85) He asked them if they lived in the HUB zone and if they were willing to go work for him. (TR 26-27, 85) One of the employees he interviewed was Angela Cox. Cox stated that Tobin told her that he would be starting a company in the back of the building and that if she worked for him her working conditions would stay the same. (TR 176) Tobin also testified that he told employees that he didn't anticipate any changes if they went to work for him. (TR 27-28, 176) Another employee Tobin interviewed was Joe Horton who was also told that if he went to work for Tobin everything would basically stay the same. Tinker also talked to Tobin about his future plans to operate out of the back of the facility. (TR 225) Tobin told him that he needed employees that lived in the HUB zone. (TR 226)

At the end of October 2013, the Region dismissed the decertification petition filed in August for being untimely. (TR 124, 252) On November 4, 2013, Respondent held an employee-wide meeting. (TR 227, 244) Pettit informed employees that they were going to get a $100 bill

cash bonus for having shipped product worth $1 million in the month of October. (TR 88-89, 227, 244) At around the end of the work day, supervisors and managers went around the facility and hand delivered an envelope to each employee with a crisp $100 bill in it. (TR 227-228, 244, 248) This is the first and only time that employees have received a cash bonus either under SM or Respondent. (TR 229, 232) Respondent did not notify the Union about this cash incentive and did not bargain with the Union over it. (TR 89, 126) The Union had posted for about two weeks prior, at the facility, that there would be a union meeting to elect union officers after work on November 4. (TR 125-126, 228-229) Jamarcus Tinker went around the facility and reminded people of the meeting that same day. (TR 231) Only three employees attended the union meeting that evening. (TR 126, 178-179, 229) The average number of employees that attend union meetings is between 8 and 15. (TR 239) The decertification petition was re-filed on November 12, 2013. (TR 252)

By letter dated November 25, 2013, the Union informed Respondent that it wanted to begin bargaining for a new contract as soon as possible prior to the expiration of the contract. (TR 127, G.C. Ex. 5). By letter dated November 27, 2013, Goods-North replied that it was premature for the Union to make its request because the contract states that a request to terminate the contract may only be done sixty days prior to its expiration. (TR 127, G.C. Ex. 5). On December 20, 2013, by email, Altman renewed his request to begin contract negotiations. (G.C. Ex. 6). Goods-North replied on December 23, 2013, by email, stating that they could start negotiations anytime and asked that the Union submit a renewal proposal. (G.C. Ex. 6). Altman replied proposing January 6, 2014 to meet and Goods-North agreed. (TR 129, G.C. Ex. 6). The parties continued exchanging emails through December 31 culminating in the Union faxing its contract proposal and asking that Respondent do the same prior to the January 6th bargaining

meeting. (TR 131, G.C. Ex. 7). After receiving the faxed proposal, Goods-North emailed Altman and requested to move the meeting to January 9, 2014 to give her more time to review the Union's proposal. (TR 131, G.C. Ex. 8). Altman replied stating that he was disappointed that Respondent had not sent him its proposal yet. (TR 132-133, G.C. Ex. 8). North-Goods explained that at the time there was a lot of confusion regarding the contract because she did not know what Castleman wanted to do. (TR 53) On January 3, 2013, by facsimile, Altman received a letter from Respondent's attorney stating that Respondent was in possession of a document signed by a majority of the unit employees indicating that they did not wish to be represented by the Union and that based on that petition Respondent would not negotiate with the Union for a contract but would continue to "honor the collective bargaining agreement currently in effect". (TR 134, Jt. Ex. 3) Accordingly, to date Respondent has not bargained with the Union over a new contract and the collective-bargaining agreement expired by its terms in February 2014. (TR 55, Jt. Ex. 1)

In March 2014, Respondent announced to its employees that their pay dates would change from every other Wednesday to the 5th and the 20th of the month starting in April. (TR 135, 62, 229) Respondent did not bargain with the Union about this change and the change was implemented as announced in April 2014. (TR 62-63, 135, 184, 229)

II. ANALYSIS

The Administrative Law Judge found that Respondent could not withdraw recognition from the Union, as it did on January 3, 2014, because the "successor bar" rule established in UGL-UNICCO Service, Co. 357 NLRB No. 76 (2011) applied. With regard to the General Counsel's additional argument that Respondent could not withdraw recognition because significant unremedied unfair labor practices exist, the Administraive Law Judge reasoned that it

was unnecessary to rule on that alternative theory because he had already found the withdrawal of recognition unlawful based on the successor bar. (ALDJ p. 22, fn. 23) The Admininstrative Law Judge stated that he made findings of fact relevant to that theory should further analysis be necessary. Counsel for for General Counsel contends that the Admininstrative Law Judge's findings support holding that the withdrawal of recognition was tainted in this case by Respondent's unlawful conduct.

Board law is well-settled in that an employer cannot avoid its duty to bargain with a union by relying upon any loss of majority that is attributable to its own unfair labor practices. Master Slack, Corp., 271 NLRB 78 (1984). The unfair labor practices must be of a character as to either affect the Union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. Id. There must be a causal relationship between the unfair labor practices and the employee disaffection. Id. The Board has identified several factors that are relevant in determining the existence of a causal relationship: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employee's morale, organizational activities, and membership in the union. Penn Tank Lines, Inc., 336 NLRB 1066, 1067 (2001), citing Master Slack, 271 NLRB, supra at 84. Courts have found a causal connection between the alleged unfair labor practices and an anti-union petition where the unfair labor practices included threats of job loss, denial of access to the union, and coercive statements. McKinney ex rel. N.L.R.B. v. Southern Bakeries, LLC, 2014 WL 3973858 (F.Supp.2d) (appeal pending 8th Cir.). In addition, the Board has held that a bargaining order is warranted as a remedy for unlawful withdrawals of recognition where the union has been precluded from reestablishing

its majority support subsequent to unfair labor practices after an untainted majority anti-union petition. Spectrum Health-Kent Community Campus, 255 NLRB 580 (210), aff'd 353 NLRB 996 (2009), enf'd 647 F.3d 341 (D.C. Cir. 2011).

In the instant case, the Administrative Law Judge found that just days after the asset buyout, Respondent unlawfully denied the Union access to its bargaining unit employees. This occurred on August 22, 2014, the very same day that eleven employees signed the decertification petition and a day before another four employees signed it. It was during this critical period of time that employees had the most questions and concerns, and the company knew it. Respondent's Vice-President of Operations, Gerald Pettit, testified that he denied access in part because the asset buyout was still too new, he was not really sure how things were going to work out, and that he did not want employees speculating on anything. The Administrative Law Judge found that the one-time unilateral change to union access practices was material, substantial and significant. Judge Carter pointed out that Respondent precluded all conversations between the Union and employees at the facility on the day in question. A decertification petition was filed shortly thereafter on August 28, 2013. The Union did not have time to reestablish employee support because Respondent continued committing unfair labor practices. On October 16, 2013, the Vice-President of Human Resources made the unlawful threat that there would be two companies operating at the facility, one union and one non union. The decertification petition was dismissed by the Region on October 30. However, a few days later, on November 4, 2013, Respondent gave employees an unprecedented cash bonus of $100, without bargaining with the Union. The impact of this bonus was clearly demonstrated when only three employees went to a union meeting planned for later that same day. The decertification petition was re-filed a week later on November 12, 2013. A copy was provided anonymously to the employer this time. The

unfair labor practices did not end here, though, because Respondent almost immediately unlawfully withdrew recognition on January 3, 2014. Clearly, all of the unfair labor practices occurred within months from the filing and re-filing of the decertification petition. Most notably, a copy of the petition was delivered anonymously to the employer right after employees got the cash bonus. Since Respondent became the owner of the facility, the employees have seen the Union be weakened by Respondent's unlawful unilateral changes. Under these circumstances, Respondent was precluded from lawfully withdrawing recognition from the Union.

III. CONCLUSION

Based on the above, the General Counsel respectfully requests that its exceptions be granted and that the Board find and conclude that Respondent could not lawfully withdraw recognition from the Union by relying on a loss of majority that is attributable to its own unfair labor practices.

Dated at Indianapolis, Indiana this 21st day of October 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision has been filed electronically through the E-filing Program this 21st day of October 2014. On the same date a copy of said filing was served by electronic mail upon the following persons:

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